

FILED

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MAR 28 2006

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

Marine Energy Systems Corporation,

Debtor.

W. Ryan Hovis, Trustee for Marine Energy
Systems Corporation,

Plaintiff,

v.

General Dynamics Corporation, Electric Boat
Corporation, Siemens Westinghouse Power
Corporation, and Viacom, Inc.,

Defendants.

C/A No. 97-01929-W

Adv. Pro. No. 98-80220-W

Chapter 7

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Motion to Compel Discovery and for Sanctions filed by Defendant General Dynamics Corporation and Defendant Electric Boat Corporation ("Moving Defendants") is granted. Plaintiff shall supplement his answers to Moving Defendants' Second Set of Interrogatories in accordance with the attached Order within ten (10) days from the entry of the attached Order. Plaintiff shall pay Moving Defendants' counsel, Lawrence S. Schaner, Jenner & Block, LLC, One IBM Plaza, Chicago, IL 60611, the sum of \$5,000.00 within ten (10) days from the entry of the attached Order.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 28, 2006

ENTERED

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L. G. R.

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C/A No. 97-01929-W

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Chapter 7

ORDER

ENTERED

MAR 28 2006

L. G. R.

This matter comes before the Court upon Motion to Compel Discovery and for Sanctions ("Motion") filed by Defendant General Dynamics Corporation and Defendant Electric Boat Corporation ("Moving Defendants"). Moving Defendants seeks to compel Plaintiff W. Ryan Hovis, as trustee for Marine Energy Systems Corporation, ("Plaintiff") to respond to certain interrogatories and Moving Defendants seek their fees and costs associated with prosecuting the Motion. Pursuant to Rules 33 and 37 of the Federal Rules of Civil Procedure, made applicable to this proceeding pursuant to Bankr. R. Civ. P. 7033 and 7037, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDING OF FACT

1. Marine Energy Systems Corporation ("Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code on March 4, 1997.

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

2. As a debtor in possession, Debtor filed this adversary action against the Moving Defendants on October 15, 1998.

3. On November 15, 1998, Debtor's case was converted to a case under Chapter 7. Plaintiff was appointed trustee of Debtor and Plaintiff assumed the prosecution of this action on behalf of Debtor's estate.

4. Numerous causes of action were asserted by Plaintiff against the Moving Defendants in various versions of the original complaint. In June 2003, Plaintiff filed its Third Amended Complaint, the most recent complaint in this action. Of the causes of action raised by Plaintiff in this complaint and after prior orders of this Court, only Plaintiff's actions for fraud and negligent misrepresentation remain for trial.

5. On September 7, 2005, Plaintiff supplemented its answers to Moving Defendants' First Set of Interrogatories. Plaintiff's supplemented answers identify eighteen alleged misrepresentations by Moving Defendants on which the remaining causes of action are based. Moving Defendants contend that these eighteen misrepresentations ("New Fraud Allegations") were not previously identified by Plaintiff and Moving Defendants sought to bar Plaintiff from presenting any evidence as to the New Fraud Allegations.

6. This Court orally ruled on October 12, 2005 that Plaintiff could present evidence as to the New Fraud Allegations and reopened discovery for the specific purpose of allowing Moving Defendants to conduct discovery as to the New Fraud Allegations. The Court did not set a deadline as to when discovery should be concluded.

7. Moving Defendants served their Second Set of Interrogatories and Request for Production on Plaintiff on October 26, 2005.

8. Plaintiff failed to timely respond to these discovery requests. Moving Defendants

thereafter attempted to confer with Plaintiff to obtain the answers to the discovery requests but did not receive answers after corresponding several times with Plaintiff.

9. Moving Defendants filed the Motion on December 28, 2005 and request that the Court compel Plaintiff to answer this discovery and sanction Plaintiff for fees and costs incurred in prosecuting the Motion.

10. On January 6, 2006, Plaintiff submitted its response to Moving Defendants' discovery requests. According to counsel for the Moving Defendants, they will accept the reasons for Plaintiff's failure to respond before January 6, 2006 and do not seek fees and costs incurred before that date. Moving Defendants nevertheless prosecute this Motion on grounds that Plaintiff's answers to Interrogatories 1, 2, 4, 5, and 6 are insufficient and evasive.

11. Between January 6, 2006 and the hearing on the Motion, Plaintiff and Moving Defendants conferred regarding the sufficiency of Plaintiff's answers.

12. On March 5, 2006, three days before the hearing on the Motion, Plaintiff amended its answers to the Interrogatories. Plaintiff's Amended Interrogatory Answers are not signed in accordance with Fed. R. Civ. P. 33.²

13. At the hearing on the Motion, Moving Defendants concede that they are satisfied with Plaintiff's answers to Interrogatories 3 and 5 but contend that the remaining answers to their Interrogatories are insufficient.

14. On March 15, 2006, Moving Defendants' counsel filed a declaration indicating that Moving Defendants incurred at least \$5,000.00 in fees associated with the Motion. Moving Defendants are not seeking costs associated with the travel of their counsel, fees associated with

² In this Order, the Court is considering only Plaintiff's responses dated January 6, 2006 because the responses served on or about March 5, 2006 were not signed in accordance with the Rules of Procedure. However, because Moving Defendants are satisfied with the answer provided in the Amended Interrogatory Answers to Interrogatory No. 5, the Court will not address the sufficiency of Plaintiff's answers to this Interrogatory.

their counsel's travel time, or fees by other employees of counsel.

CONCLUSIONS OF LAW

In order to determine whether Plaintiff's discovery responses to the discovery requests propounded by Moving Defendants were inadequate and warrant the award of fees and costs, the Court must examine the specific discovery requests and answers. See Elite Financial Services, Inc. v. Adams, C/A No. 04-11179-W, Adv. No. 04-80339-W, slip op. at 4 (Bankr. D.S.C. Feb. 23, 2005). As part of this inquiry, the Court must also determine the reasonable scope of discovery and "adjust the timing of discovery and apportion costs and burdens in a way that is fair and reasonable." Id. (quoting Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 37-38 (D. Md. 2000)). Rule 26 permits discovery of "any matter, not privileged, which is relevant to the claim or defense of any party" Fed. R. Civ. P. 26(b)(1). The rules of discovery are designed for an orderly and fair discovery process. McCullough v. AllState Insurance Co. (In re Ingram), C/A No. 98-05909-W, Adv. Pro. No. 98-80251-W, slip op. at 3 (Bankr. D.S.C. Dec. 2, 1999).

I. Failure to Answer Interrogatories Under Oath

Rule 33 requires interrogatories to be answered "separately and fully in writing under oath" Fed. R. Civ. P. 33(b)(1). In this case, Plaintiff's counsel answered interrogatories on behalf of Plaintiff. Counsel appears authorized to answer the interrogatories on behalf of Plaintiff. Fed. R. Civ. P. 33(a). See also Wilson v. Volkswagen of America, 561 F.2d 494, 508 (4th Cir. 1978), cert. denied, 434 U.S. 1020 (1979) (noting that the language of Rule 33 has been construed to authorize an attorney to answer on behalf of a party). Plaintiff's counsel did not indicate that he answered the interrogatories under oath or that some other agent of Plaintiff did so. Failure to provide answers to interrogatories under oath constitutes a failure to answer and

gives rise to an award of fees and costs to Moving Defendants under Rule 37. Adams, supra at 5. Therefore, within ten (10) days from entry of this order, Plaintiff's counsel shall resubmit Plaintiff's answers to Moving Defendants' Interrogatories with an accompanying oath.

II. Failure to Provide Sufficient Responses to Moving Defendants' Discovery Requests

At the hearing on Moving Defendants' Motion to Compel, Plaintiff argued that Moving Defendants' Interrogatories exceeded the number of interrogatories allowed by Rule 33. If there is any merit to this objection, the objection has been waived by Plaintiff's failure to specifically state the objection in its answers to the Interrogatories. See Fed. R. Civ. P. 33(b)(4), SC LBR 7026-1(c) ("any objection to any interrogatory ... shall be in writing and shall also be served no later than the deadline for response to the applicable discovery"); Ingram, supra at 4.

A. Interrogatory No. 1

Moving Defendants' First Interrogatory provides as follows:

For each of Plaintiff's new fraud allegations, identify the content of the representation that Plaintiff contends was false. For each written representation, Plaintiff shall identify the document in question, provide the page number, and quote the precise language. For oral representations, Plaintiff shall provide the exact words alleged to have been used.

As a preliminary matter, Plaintiff submitted a late objection to this Interrogatory. Plaintiff objected to Interrogatory No. 1 to the extent that Moving Defendants previously defined certain terms used in the Interrogatory, to the extent the Interrogatory seeks a legal conclusion, and that it is ambiguous and duplicative. On its face, this Interrogatory does not appear to be ambiguous or duplicative. This Interrogatory also does not appear to call for a legal conclusion, it only seeks discovery of those representations which Plaintiff contends were false. These types of interrogatories are generally allowed to discover facts underlying a party's contention that it has support or a legal theory for a certain position. See Capacchione v. Charlotte-Mecklenburg

Schools, 182 F.R.D. 486, 489 (W.D.N.C. 1998) (holding that contention interrogatories are permitted under the Rules of Procedure). Finally, Plaintiff objects to the definitions used by Moving Defendants in its Interrogatories. Moving Defendants defined terms such as, “Plaintiff,” “New Fraud Allegations,” and “document” in its definitions for the Interrogatories and also provided instructions for Plaintiff on what information Moving Defendants sought when Plaintiff identified a document, a communication, or a person in his responses. Again, there appears to be nothing unusual or ambiguous about Moving Defendants’ definitions or instructions. There is also nothing burdensome about Moving Defendants’ instructions and Plaintiff should provide answers in accordance therewith unless Plaintiff lacks the requisite knowledge to respond to the request. To the extent that Plaintiff believes that any request calls for information protected by the attorney-client privilege or by the work product doctrine, Plaintiff may object and seek a protective order in accordance with SC LBR 7026-1(c).

Plaintiff’s initial response to this Interrogatory spans five pages and contains eighteen different subparts to correspond with the eighteen allegedly New Fraud Allegations. Plaintiff sufficiently identifies the general content of each representation.

Each of the eighteen subparts appears to refer to written representations contained principally in one document, the Prospectus, which is sufficiently described in first subpart of the Plaintiff’s answer. Plaintiff’s description of other documents in his response is also sufficient; however, Plaintiff failed to “identify” the Prospectus or these other documents it cited in his response in accordance with the instructions appearing at the beginning of the Interrogatories. Therefore, Plaintiff shall amend his answers ten (10) days from the entry of this order to comply with the identification of the documents described by Plaintiff, which is called for by Interrogatory No. 1. Also, Plaintiff generally concludes each subpart with a statement that the

new fraud allegations may be supported by other documents previously produced by Plaintiff. To the extent Plaintiff has any such documents and has not identified these documents in accordance with Interrogatory No. 1, he should identify these documents in an amended response to this Interrogatory. It would be an abuse of Rule 33(d) for Plaintiff to generally refer to any and all documents he has produced, which may or may not contain fraudulent representations. Moving Defendants should not be expected to review each document previously produced and determine if Plaintiff may claim that any statement contained therein is fraudulent. Fraud is, by Rule, an action that requires specificity on the part of the party alleging it. See Fed. R. Civ. P. 9(b). Plaintiff cannot abuse Rule 33(d) by generally referring to all documents, which may support his allegations of fraud and therefore shall amend his answers to properly identify all such documents in accordance with this Interrogatory, to the extent that such documents exist, within ten (10) days from the entry of this Order.

In each of the subparts that rely on the Prospectus, Plaintiff sufficiently identified the page number of the Prospectus, which contains the alleged fraud by referring to the Bate Stamp numbers of documents produced by Plaintiff. Plaintiff failed to sufficiently identify the page numbers of other documents cited in his responses and therefore shall amend his answers within ten (10) days from the entry of this Order to precisely identify the page numbers of the other documents cited in his response to Interrogatory No. 1.

Interrogatory No. 1 also calls for Plaintiff to quote the precise language of the written representation which he contends is fraudulent. The Court does not have a copy of the documents produced by the Plaintiff; however, it does not appear that in each of the eighteen subparts that Plaintiff quoted the language that he is relying upon in this action. It appears that in some of the subparts, Plaintiff quotes language of a document and that in other subparts, he

summarizes an allegation. To the extent that Plaintiff has not precisely quoted from all of the document he is relying upon, he must amend his responses to these discovery requests to quote the language that he contends is fraudulent within ten (10) days from the entry of this Order.

There appears to be one oral representation cited by the Plaintiff in its response to this Interrogatory. In subpart 18, Plaintiff refers to certain assurances provided to the former principal of the Debtor. Plaintiff fails to identify the communication, as set forth in the definitions and instructions, and fails to use the exact words alleged to have been used by the person making the representation. Therefore, to the extent that Plaintiff has the requisite knowledge to respond to this Interrogatory in the manner called for by the request, Plaintiff shall amend its answers within ten (10) days of the date of entry of this Order.

B. Interrogatory No. 2

Moving Defendants' Second Interrogatory provides as follows:

For each representation identified in Plaintiff's answer to Interrogatory No. 1, state: (a) who made it; (b) to whom it was made; (c) whether it was made orally or in writing; (d) the date it was made; (e) where it was made; and (f) how it the Plaintiff relied upon it.

Plaintiff again objected to this Interrogatory to the extent it incorporated Moving Defendants' definitions and instructions and that Interrogatory No. 2 was repetitive of Interrogatory No. 1. Plaintiff then responded to the Interrogatory by incorporating by reference its response to Interrogatory No. 1 and generally stating its reliance on the representations identified in his response to Interrogatory No. 1.

The Court disagrees with Plaintiff's objections and finds that the definitions and instructions incorporated by reference are not objectionable and that Interrogatory No. 2 is not repetitive. Interrogatory No. 2 requires Plaintiff to identify essential elements of a fraud case, which are clearly relevant and discoverable under Rule 26. Plaintiff's answer to Interrogatory

No. 1 does not provide the information required by parts (a), (b), (d), (e), or (f) of Interrogatory No. 2. Although Plaintiff has answered part (f) in his response to Interrogatory No. 2, he has not provided answers to these remaining parts and therefore shall amend his answers within ten (10) days from the entry of this Order to provide the information required by parts (a), (b), (d), and (e) of Interrogatory No. 2.

C. Interrogatory No. 4

Moving Defendants' Fourth Interrogatory provides as follows:

For each representation identified in Plaintiff's answer to Interrogatory No. 1, identify each document that supports Plaintiff's contention that the representation was false.

Plaintiff responded to this Interrogatory by identifying the documents set forth on Schedule 1, which is a list of documents introduced at various depositions. Plaintiff also states that he shall identify "hundreds of thousands of pages of records produced in connection with this case which are devoid of support for these representations." Plaintiff did not "identify" the documents on Schedule 1 in accordance with Moving Defendants' definitions and instructions and therefore shall amend his answer to so identify these documents within ten (10) days from the entry of this Order. Plaintiff's response as to documents that are "devoid" of support for the New Fraud Allegations is also ambiguous and non-responsive as the request calls for the identification of documents, which support each representation.

It otherwise appears that Plaintiff has properly responded to this Interrogatory so long as every document listed in Schedule 1 supports every representation identified by the Plaintiff in his answer to Interrogatory No. 1. If each document in Schedule 1 does not support each representation identified by Plaintiff in his response to Interrogatory No. 1, then Plaintiff shall amend his answer to this Interrogatory within ten (10) days from the date of the entry of this

Order to identify which particular documents in Schedule 1 support a particular representation identified in Interrogatory No. 1.

D. Interrogatory No. 6

Moving Defendants' Sixth Interrogatory provides as follows:

For each representation identified in Plaintiff's answer to Interrogatory No. 1, identify each person with knowledge of the representation and state the substance of each such person's knowledge, the date on which the person's knowledge was acquired, and the manner in which it was acquired.

Plaintiff responded to this Interrogatory as follows:

Plaintiff did not identify any persons in response to Interrogatory No. 1, except as may be identified in a writing referenced therein. Such writings sets forth the persons knowledge as to the issues identified therein.

Plaintiff response is evasive and incomplete. Moving Defendants request that Plaintiff, to the extent that he has the requisite knowledge, identify everyone who may have knowledge of the allegedly false representations and what those persons know about the representations. Again, Moving Defendants appear to be assessing how Plaintiff may prove his case and who may be a witness as to these representations, which may lead to further discovery and depositions. Plaintiff has failed to identify persons with knowledge of the New Fraud Allegations and the other particular information called for by Interrogatory No. 6. Therefore, Plaintiff shall amend his answer to Interrogatory No. 6 within ten (10) days from the entry of this Order to provide Plaintiff with the response required by the Interrogatory.

III. Moving Defendants are entitled to requested fees and costs

Moving Defendants seek \$5,000.00 in fees and costs associated with the prosecution of its Motion. Considering the incomplete responses of the Plaintiff, the Moving Defendants good faith effort to confer with Plaintiff regarding his responses, and the Moving Defendants' time and costs associated with its Motion, the Court finds that \$5,000.00 in fees and costs is

reasonable. Pursuant to Rule 37(a)(4), the Court orders Plaintiff to pay Moving Defendants' counsel, Lawrence S. Schaner, Jenner & Block, LLC, One IBM Plaza, Chicago, IL 60611, the sum of \$5,000.00 within ten (10) days from the entry of this Order.

CONCLUSION

It is therefore,

ORDERED, that Plaintiff shall amend his discovery responses in accordance with this Order within ten (10) days from the entry of this Order, and it is further

ORDERED, that Plaintiff pay Moving Defendants' counsel the sum of \$5,000.00 within ten (10) days from the entry of this Order.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 28, 2006